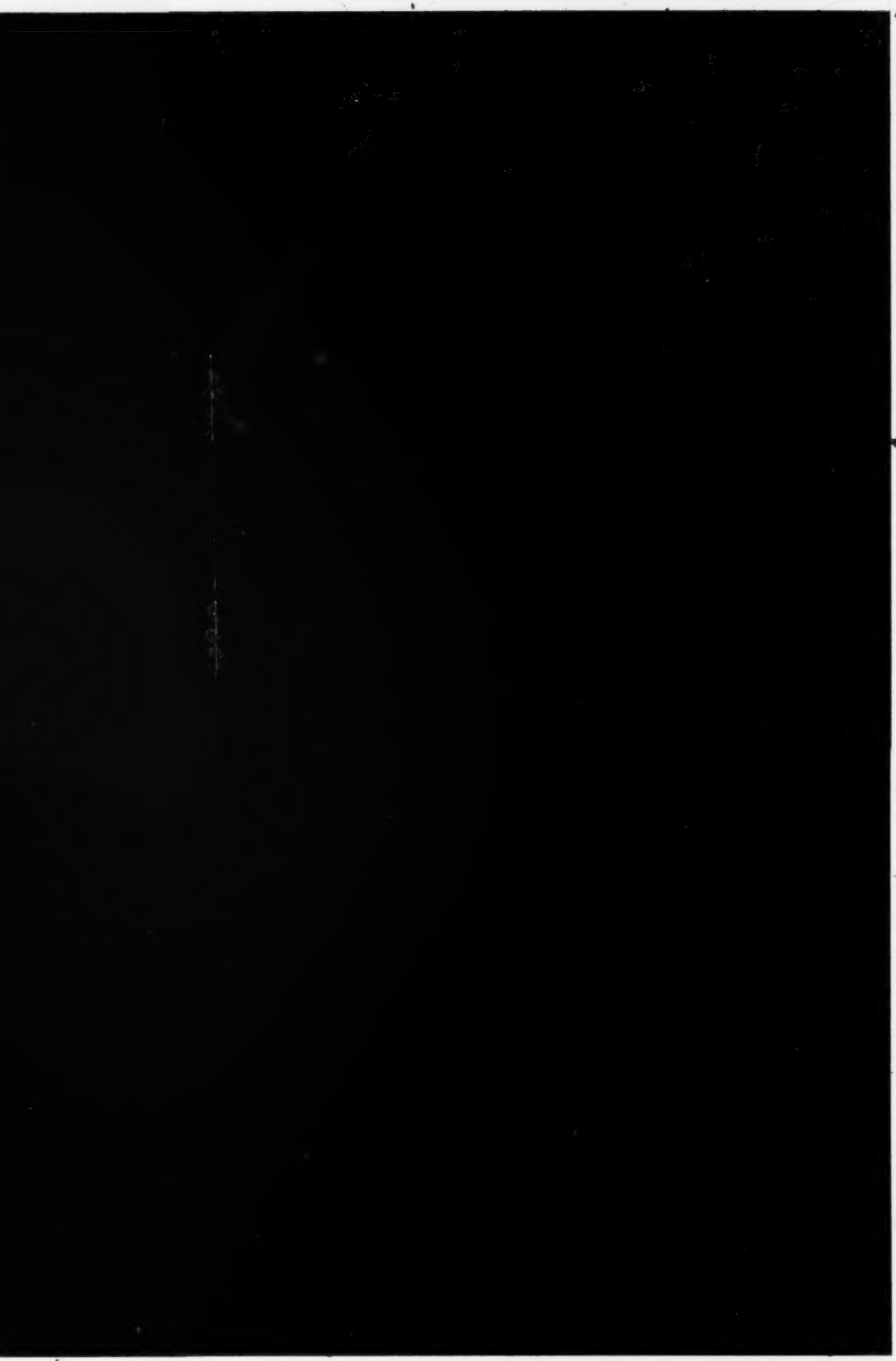

IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners' Reply to the Memorandum for the United States.

The Solicitor General on behalf of the United States has suggested to the Court that the appropriate disposition of the Petition for a Writ of Certiorari herein is a remand to the court below. The basis of this suggestion is a concession by the Solicitor General that the trial court erred in failing to give an instruction requested by the petitioners, and it is requested by the Solicitor General that the court below be given an opportunity to resolve this limited question.

The petitioners respectfully request that a different disposition be made. The petitioners request that the Petition for a Writ of Certiorari herein be granted and

that, after hearing, the judgments of conviction be reversed with directions to dismiss the indictment. This request is made on behalf of petitioners in the interest of justice and to insure a fair administration of criminal justice in the courts of the United States.

In particular, the petitioners allege as follows:

1. The indictment against these California residents was returned in Grand Rapids, Michigan on March 24, 1960 (1a). Without fault of the petitioners, the case herein is now some six years old, and the financial burdens placed on petitioners as a result of the trial of this case has been so great and so onerous as to virtually put them out of business. An existing order restrains the corporate petitioner from making any transfer or disbursements of its assets, except necessary disbursements to enable the corporation to carry on its day-to-day business until the final judgment is entered "and satisfied" in the action. The individual petitioners are restrained from making any transfer or disbursements of their assets, except as necessary for living expenses, until such time as a final judgment is similarly entered and satisfied (769a-770a). Bail for the petitioners in this case was fixed at $85,000 (606a-607a), and has been furnished.

By the request for a limited remand, the Solicitor General is seeking to preserve intact all the rulings of the trial court and the Court of Appeals, except for the one conceded erroneous ruling made on one specific request by petitioners for an instruction with respect to "redeeming social value". *United States v. West Coast News Co., Inc., et al.*, 216 Fed. Supp. 911, 228 Fed. Supp. 171, 30 F.R.D. 13, 357 F. 2d 855; Appendix A to Petition. The principles enunciated by the trial court

and the court below have been accepted as governing law by other courts in other jurisdictions. *United States v. Luros, et al.*, 243 Fed. Supp. 160, 176 (D.C. Iowa 1965); *United States v. Jessup*, 38 F.R.D. 42, 44 (D.C. Tenn. 1965).[1]

Although the court below had the benefit of this Court's decision in *Jacobellis v. Ohio*, 378 U.S. 184 (Appx. A to Pet. p. 14), the court below found no error in any instructions given or refused by the trial court. On limited remand, there will therefore be only two possibilities: (1) that the court below will reaffirm its position and the petitioners will be again compelled to make application to this Court for review; or (2) the court below will reverse the judgments of conviction and order a new trial in Grand Rapids, Michigan for these petitioners. The result can only be additional financial and physical burdens upon petitioners, which burdens petitioners are no longer in a position to assume. The second trial would be governed by the rules of law enunciated by the court below which resulted in the affirmance of judgments of conviction wherein

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[1]In *United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, C.R. 65-H-172, unreported, another federal prosecution instituted by the Government under the multiple venue provisions of the federal obscenity statutes in Houston, Texas against California and Ohio residents, District Judge Joe Ingraham, made the folownig statement:

> "Now, I want to make this announcement, that I intend to try this case on the pattern of the Aday case in the Sixth Circuit, which was affirmed by the Sixth Circuit, and to the extent that it is applicable in this case, I expect to charge the jury in much the same manner, so, if that is any assistance to Counsel on either side of the table, we have to proceed in one way or another, and that is a case that I expect to follow."
>
> (Reporter's Daily Transcrpit of Proceedings [8/2/66], pp. 964-965).

sentences of twenty-five years and nineteen years imprisonment, subsequently reduced to ten years and five years imprisonment, were imposed.

The other questions presented in the Petition which the Government seeks to leave undisturbed are questions of substantial importance which should be decided by this Court since, if permitted to remand undisturbed, they will not only make any subsequent trial fundamentally unfair and violative of due process, but they will also seriously affect other trials which have taken place, or which the Government contemplates instituting under the multiple venue provisions of the federal obscenity statutes. Petitioners turn, therefore, to a very brief discussion of some of the significant questions that are presented on this Petition for a Writ of Certiorari.

2. One of the questions presented on this Petition is, whether the federal obscenity statutes, 18 U.S.C. 1461 and 1462, as amended by Congress in 1958 permitting the Government a multiple choice of venue in prosecutions involving the mailing and shipment of books and other media of communication, on their face and as construed and applied, violate the free speech and press, the due process and fair trial provisions of the First, Fifth and Sixth Amendments (Ques. 5, Pet. p. 7).

In denying a Petition for Stay pending appeal in the case of *Reed Enterprises, et al. v. Katzenbach, et al.*, United States District Court for the District of Columbia, Civil No. 1744-65, Justice Black stated:

> "As shown by the Court of Appeals opinion in Reed Enterprises v. Corcoran, 354 Fed. 2nd 519, this proceeding involves serious constitutional questions concerning multiple prosecutions in many ju-

risdictions. I am denying the stay here however, solely because of the Solicitor General's statement that no other prosecutions are intended to be brought anywhere based on the materials here involved — Petition denied."

(Letter from Office of the Clerk of the Supreme Court of the United States dated June 30, 1966.)

In *Reed Enterprises v. Corcoran,* 354 F. 2d 519, 522 (D.C. Cir. 1965), Circuit Judge J. Skelly Wright made the following statement:

"While we do not, of course, intimate any opinion as to the constitutionality of the 1958 amendment, an attack on a statute which would permit the prosecution a multiple choice of venue in this protected area of First Amendment freedoms is not patently frivolous. Such choice could induce the publisher to engage in self-censorship and thus restrict the public's access to protected publications. 'Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.' Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 1125, 14 L.Ed.2d 22 (1965).

"We find that the complaints filed in the District Court raise a substantial question as to the constitutionality of the 1958 amendment."

Thus, it is plain, it is submitted, that the question of the constitutionality of the federal obscenity statutes, as amended, is a question of great substantial importance which should be decided by this Court and which clearly will not be satisfactorily resolved in any subse-

quent re-trial herein if this Court does not make a final ruling. See, Petition, pages 43-46. See also, Appendix L to Petition, pages 52-54, wherein the legal proceedings instituted against petitioner Aday in Fresno, California; Phoenix, Arizona; Honolulu, Hawaii, and Houston, Texas (in March, 1965) are discussed.

3. Another question presented in the case herein of substantial importance in all federal obscenity prosecutions, including the one herein, is whether the judgment of conviction can stand in the light of the due process and free speech provisions of the First, Fifth and Sixth Amendments where no evidence, other than the book itself, was offered by the prosecution to establish the alleged obscenity of the book (Ques. 2, Pet. p. 6).

Involved in this question is the right to fair notice and hearing, the right of confrontation and the assistance of counsel, as well as the basic question, whether speech and press may be made criminal without proof of the essential elements purportedly constituting criminal speech. Unless the issue discussed and determined in *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965), is finally resolved by this Court, courts and juries sitting in federal obscenity trials will be sitting as censorial groups and subjecting books and other media of communication to arbitrary and discriminatory suppression.

The petitioners submit that the motions they made for judgments of acquittal should have been granted because of a complete failure of proof by the prosecution. See, *Yates v. United States,* 354 U.S. 298, 327-331.[2]

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[2]The Memorandum of the United States, at page 4, footnote 2, suggests that petitioners might have been found guilty under the rule enunciated in *Ginsburg v. United States*, 383 U.S. 463, if the jury found that the accused publications originated in "the sordid business of pandering". It is stated that an instruction to this

4. Another substantial question presented in the Petition is the question of the trial court's instructions and refusals to instruct, approved by the court below, on the issue of scienter (Ques. 1, Pet. pp. 4-5). The trial court instructed the jury that the Government was required to prove only that each of the petitioners "knew the contents of the book"; refused to instruct the jury that the Government was required to prove that each of the petitioners knew that the book was obscene, and refused to instruct the jury that if the jury found that petitioners were honestly ignorant of the alleged obscenity of the book then petitioners were entitled to an acquittal.

The court below held that the aforesaid instructions and refusals to instruct were clearly correct and constitutionally permissible (Appx. A to Pet. pp. 12-13). Based upon said decision of the Court of Appeals, District Court Judges in Sioux City, Iowa and Houston, Texas have similarly instructed the juries in multiple venue prosecutions under the federal obscenity statutes. *United States v. Luros, et al.*, United States District Court for the Northern District of Iowa, Western Division, 65-C.R.-3007-W; *United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, C.R. 65-H-172.

That this question is one of great constitutional importance is attested to by the grant of certiorari in *Redrup v. New York*, October Term 1966, No. 3; and

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effect was not given. However, the record is barren of any evidence of "pandering" in the production, sale or publicity relative to the book herein. Thus, although no evidence was presented at the trial to prove "obscenity" or "pandering", the Government would now subject petitioners to further jeopardy even if judgments of acquittal should properly have been granted. This clearly raises a substantial question which should be decided by this Court.

Austin v. Kentucky, October Term 1966, No. 16, now set for argument before this Court on October 10, 1966. See also, *Mishkin v. New York,* 383 U.S. 502. The elimination of a requirement of guilty knowledge in federal obscenity prosecutions, it is submitted, renders 18 U.S.C. 1461 and 1462, as amended, vague, ambiguous and violative of the free speech and press and due process provisions of the First and Fifth Amendments. See, Petition, pages 24-28. It is submitted that all federal courts, including the courts below, should receive the guidance of this Court on this fundamental question before any further prosecutions under the federal obscenity statutes are conducted. Without a definitive ruling from this Court, constitutional infirmities will infect future proceedings to the detriment of both the Government and the accused alike.

5. The Petition for a Writ of Certiorari also presents the question, whether the book *Sex Life of a Cop* by Oscar Peck is entitled to the protections of the free speech and press provisions of the First Amendment (Ques. 4, Pet. p. 7). For the dissemination of this single book, it should be noted that petitioner Aday was sentenced in the trial court to twenty-five years imprisonment, later reduced to ten years, and a fine of $25,000. The petitioner Maxey was sentenced in the trial court to fifteen years imprisonment, later reduced to five years, and a fine of $19,000. The corporate defendant was fined the sum of $25,000.

The petitioners submit that the book *Sex Life of a Cop* has ideas of social importance; does not exceed contemporary standards in the depiction of sex; and does not appeal to a shameful or morbid interest in sex. Measured by the constitutional standards for judging

obscenity as enunciated and applied by this Court, petitioners submit that said book is not obscene and is entitled to the protections of the First Amendment (Pet. pp. 40-42). If the holding of the court below is permitted to stand, the book will be used, and is being used, as a standard for judging the obscenity of other writings. Such use in the various multiple venue prosecutions, or in state courts, may have serious consequences for writings and material ordinarily entitled to constitutional protection. It is important that this Court make clear to law enforcement agencies that the standards for judging obscenity are strict and cannot be misapplied so as to suppress expression entitled to First Amendment protection.

Petitioners do not further detail the remaining substantial questions involved in the case herein. Among such substantial questions are: whether the federal obscenity statutes authorize convictions for the dissemination of a "filthy" book as well as an "obscene" book (Ques. 1, Pet. pp. 5, 29-31); whether the wholesale exclusion by the trial court of oral and documentary testimony offered by petitioners to establish the nonobscenity of the book and the absence of unlawful knowledge and intent on the part of petitioners arbitrarily deprived petitioners of a fair trial and due process of law (Ques. 3, Pet. pp. 6-7, 36-40); whether the denial of petitioners' motion for a transfer of proceedings deprived petitioners of a fair trial and their liberties and property without due process of law (Ques. 6, Pet. pp. 7, 46-47); whether the trial court unlawfully struck petitioners' motion to dismiss the indictment based on the illegal selection and organization of the Grand Jury which returned the indictment (Ques. 8, Pet. pp. 8, 48-

49); whether petitioners were denied a public trial in violation of the due process and free speech and press provisions of the First and Sixth Amemdments (Ques. 7, Pet. pp. 8, 47-48); whether the consecutive sentences of imprisonment and fines imposed upon petitioners were contrary to law and the due process and free speech provisions of the Constitution (Ques. 9, Pet. pp. 8, 49-51); and whether the sentences of fines and imprisonment imposed upon petitioners, the orders of sequestration and the imposition of bail herein constituted cruel and unusual punishment and the imposition of excessive bail in violation of the First, Fifth, Sixth and Eighth Amendments (Ques. 10, Pet. pp. 8-9, 51-52).

Conclusion.

It is respectfully submitted that the request for limited remand should be denied; that the Petition for a Writ of Certiorari herein should be granted; and that, after hearing, the judgments of conviction should be reversed with directions, to dismiss the indictment.

Respectfully submitted,

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